No. 90-5292

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In The

Supreme Court of the United States

October Term, 1990

DAWUD MAJID MU'MIN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court of Virginia

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

IN A CASE WHERE THE DEFENDANT HAS ABANDONED ANY CLAIM THAT A CHANGE OF VENUE WAS REQUIRED DUE TO PRETRIAL PUBLICITY, AND WHERE NO JUROR HAD FORMED ANY OPINION ABOUT THE CASE, DOES THE CONSTITUTION MANDATE THAT, WHEN ASSESSING JUROR CREDIBILITY ON THE ISSUE OF IMPARTIALITY, A STATE TRIAL JUDGE MUST HAVE HEARD EACH JUROR'S ARTICULATION OF THE CONTENT OF ANY PUBLICITY TO WHICH THE JUROR HAD BEEN EXPOSED?

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No. 90-5193

In The

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DAWUD MAJID MU'MIN,

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COMMONWEALTH OF VIRGINIA,

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On Writ Of Certiorari To The Supreme Court of Virginia

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The Crime

Dawud Majid Mu'Min, the petitioner, was an inmate at the Virginia Department of Corrections' Haymarket Correctional Unit serving a 48-year sentence for a 1973 first degree murder conviction. On the morning of September 22, 1988, Mu'Min and five other inmates were transported to the Virginia Department of Transportation's ("VDOT") Dale City Headquarters in Prince William County, Virginia. They were assigned to a work

detail supervised by a VDOT employee. *Mu'Min v. Commonwealth*, 239 Va. 433, 437, 389 S.E.2d 886, 889 (1990).

Mu'Min used grinding equipment at the VDOT shop to sharpen a metal spike, to which he attached a wooden handle. At the lunch break he escaped over a perimeter fence and walked a mile to Ashdale Plaza shopping center. 239 Va. at 437-438, 389 S.E.2d at 890.

Mu'Min entered Dale City Floors, a retail carpet and flooring store, confronted the owner, Gladys Nopwasky, and knocked her to the floor. He then savagely attacked her with the sharp instrument he had fashioned that morning. Mu'Min took all of the money, approximately four dollars, from the desk drawer near the victim's body. He left the store but went back to wipe his fingerprints from everything that he had touched. Mu'Min then returned to his prison work crew at the highway department. 239 Va. at 438, 389 S.E.2d at 890.

A few minutes after the attack, a customer discovered the victim's body on the floor in the back of the store. The victim's blouse and bra had been pushed up to expose her breasts. Her clothes had been removed from her waist down. 239 Va. at 438, 389 S.E.2d at 890. Nopwasky's face was so badly beaten and bloodied that she was unrecognizable. (Tr. 4/17/89, p. 264).[1]

The rescue squad arrived minutes later, but efforts to revive her were unsuccessful. (Tr. 4/17/89, pp. 265, 272). Although medical equipment detected an "electrical rhythm," indicating her heart was beating, no blood

[1] "Tr." refers to the original transcript of trial in the Circuit Court of Prince William County.

remained for her heart to pump. 239 Va. at 438, 389 S.E.2d at 890.

An autopsy revealed that the victim's face, neck, chest and left arm had been stabbed or cut sixteen times with a sharp instrument. Two of these wounds – one on the lower neck and the other on the left upper chest – were fatal. The victim had also suffered numerous "blunt-force trauma injuries" consistent with blows from a fist, causing a laceration on her forehead and bruises over a large portion of her face. 239 Va. at 438-439, 389 S.E.2d at 890.

Mu'Min's statement, admitting that he had killed Nopwasky but claiming he had done so in self defense, was admitted at trial.

Pretrial Publicity

Approximately three months before trial, Mu'Min submitted to the trial court 47 newspaper articles relating to the murder in support of a motion for a change of venue. These articles had been published between September 26, 1988, and January 14, 1989. More than half of them had appeared in the Potomac News, and the remainder in the Washington Post and several other local newspapers. The Potomac News is a daily paper with a circulation of only 25,000 in densely populated Prince William County.

One article stated that Mu'Min had been indicted in the Nopwasky murder and that he was accused of beating a fellow inmate in mid-December 1988. (App. 921).[2]

[2] "App." refers to the appendix filed in the Supreme Court of Virginia which is a part of the record before this Court.

Several focused on the alleged laxity in the supervision of work gangs (App. 922, 930-931) and a post-offense ban on prisoners working in urban work crews. (App. 923-924). The articles included descriptions of the crime and investigation and indicated that Mu'Min had confessed to killing Nopwasky. The articles also revealed that at the time of the Nopwasky offense, Mu'Min was serving a 48-year sentence for first degree murder. (App. 925). One article simply mourned the death of the victim. (App. 928).

On January 30, 1989, the court entertained Mu'Min's motion for a change of venue. (J.A. 8).[3] The defense conceded at the hearing that taken individually the newspaper articles had little impact, but asserted that they collectively created a "pervasive feeling of guilt." (J.A. 9). The trial judge deferred ruling on the venue motion until after making an attempt to seat a jury. Mu'Min voiced no objection to this procedure. (J.A. 14-15).

The Voir Dire

1. Pretrial Motions Relating To Jury Selection

On April 5, 1989, over six months after the offense, and almost three months after the publication of the last article about the case upon which Mu'Min relies, Mu'Min submitted to the trial judge 64 proposed voir dire questions. (J.A. 2-7). He also filed a motion for individual voir dire. (J.A. 15).

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[3] "J.A." refers to the Joint Appendix filed in this Court.

On April 14, 1989, the court conducted a hearing on Mu'Min's request for individual voir dire. The court denied counsel's motion on the ground that placing a prospective juror alone in a courtroom of four attorneys, a number of witnesses and court personnel would be overly intimidating. (J.A. 16-17). Instead, the court ruled that voir dire would begin with questioning the jurors collectively. (J.A. 17). In order to prevent contamination of the entire panel by questions on issues of publicity, the jurors would be broken down into panels of four, and further, if necessary, into panels of two. (J.A. 17).

With regard to Mu'Min's proposed voir dire questions, the court stated its intent to ask the model voir dire questions from the Virginia Judges' Handbook. (J.A. 17). The court then reviewed and approved 24 of the 64 proposed questions, and ruled that the remaining questions were cumulative of the handbook questions. (J.A. 17-41). During the course of the review, several of Mu'Min's questions were allowed by the court over the Commonwealth's objection, and on two occasions the court stated the question would be framed in terms more favorable to the defense than requested by Mu'Min. (J.A. 17, 19, 25, 27-30).

The court refused to allow the following proposed questions:

32. What have you seen, read or heard about this case?

33. From whom or what did you get this information?

34. When and where did you get this information?

38. What did you discuss?

39. Have you formed an opinion or conclusion about this case?

40. What is it?

41. Has anyone expressed any opinion about this case to you?

42. Who? What? When? Where?[4]

The court found that all of these matters would be covered by the model questions, including, "Have any of you acquired any information about the alleged offense or the accused from the news media or other sources, and if so, would that information affect your impartiality in this case?," and "Have you discussed this case with anyone?" (J.A. 31-32). The judge specifically noted that if any prospective juror indicated he had discussed the case, then an appropriate follow-up question would be, "Would what you discussed in any way affect your impartiality in this case?" (J.A. 32). During voir dire, the judge asked virtually the same question as refused question 39: "Have any of you expressed or formed an opinion of the innocence or guilt of the accused?" and "Is

[4] Questions 31, 35, 36 and 37 were in fact permitted by the trial judge (J.A. 31-32), although Mu'Min lists them among those denied. (Def. Br. at 10). These questions were:

31. Have you acquired any information about this case from the newspapers, television, conversations, or any other source?

35. Have you discussed this case with anyone?

36. With whom?

37. When and where?

there any person who has already formed an opinion as to the innocence or guilt of the accused?" (J.A. 48).

2. Group Voir Dire

Seven months after the offense was committed, Mu'Min's trial began with jury selection on April 17, 1989. The judge summoned twenty-six jurors into the courtroom. Speaking to the entire twenty-six, he described the case for them and began asking model voir dire questions from the Virginia Judges' Handbook. The court's group questions spanned 21 transcript pages, and were followed by two pages of questioning by the prosecution and 16 pages of questioning from the defense. (J.A. 42-54, 54-55, 56-66).

The judge asked, among other things, "Are you sensible to any bias or prejudice against either the Commonwealth or the accused?" (J.A. 44). No juror indicated any bias or prejudice. The panel was asked whether anyone had acquired any information about the alleged offense or the accused from the news media or from any other source. (J.A. 46). Sixteen jurors replied that they had. (J.A. 46-47).

Through a series of four questions the jurors were then specifically asked whether any information they had read, seen, heard or acquired from any source would affect their impartiality. (J.A. 48). Only one juror, Dennis Syphrett, responded that he was affected by pretrial information. (J.A. 48). As voir dire continued, the judge asked whether any of the jurors had formed an opinion as to the innocence or guilt of the accused, but none had. (J.A. 48). The jurors were then queried whether, in light of

any prior knowledge about the case, any could not enter the jury box with an open mind and wait until the entire case was presented before reaching a fixed opinion or conclusion as to the guilt or innocence of the accused. Only juror Syphrett indicated he did not feel that he could sit with an open mind because he had already formed an opinion about the case. Syphrett was dismissed *sua sponte* by the trial judge. (J.A. 48-49).

After Syphrett was excused, a replacement juror was chosen and was asked the same questions previously posed to the entire panel. (J.A. 49-52). Replacement juror Tsou indicated that he was not sensible of any bias or prejudice and that the only information he had received about the case came from a brief conversation from which he learned only that a murder trial was scheduled. Tsou said this information would not affect his impartiality. (J.A. 51-52). Tsou had formed no opinion as to guilt or innocence, and felt he could hear the case with an open mind. (J.A. 52).

Finally, the judge *twice* asked the twenty-six panel members if anyone knew of any reason whatever why he or she should not sit as a juror. The group indicated that it had no such knowledge. (J.A. 52, 54).

After questioning of the entire panel (J.A. 42-66), Mu'Min moved to strike for cause any member of the panel who indicated prior knowledge of the case. The motion was denied by the court "at this time." (J.A. 68-69). The court ruled that subsequent questioning in panels would provide the opportunity to further explore the impartiality of the jurors. (J.A. 69).

At the conclusion of group voir dire, the court also denied Mu'Min's request for a change of venue, and the court expressly noted the lack of impact which the pretrial publicity had had on the prospective jurors. (J.A. 71). Mu'Min subsequently abandoned his venue claim on direct appeal to the Supreme Court of Virginia.

3. Voir Dire In Panels

The court then conducted further voir dire of the prospective jurors in panels of four. Panel voir dire spans 106 transcript pages.

On request of the defense, the court allowed questions that the defense had forgotten to ask of the entire group. (App. 272-273). On at least seven separate occasions during panel voir dire, the judge assisted the defense with follow-up questions that expanded the scope of the question asked by the defense, required a more specific response from the panel, clarified a point for the defense, or covered a topic the defense had covered with one panel but neglected to cover with another. (J.A. 72-73, 74-75, 83, 87-88, 90; App. 275-277, 280-281, 287, 291-294, 328).

Defense counsel asked the first panel of four jurors whether they had discussed the case with anyone. Three of the four jurors said that they had done so with their wives when reading the newspaper. (J.A. 72). None of the four had formed an opinion based on what they had discussed, heard or read, and all of them indicated that they were neither biased nor prejudiced against the defendant. (J.A. 72). All four swore that they could enter the jury box with an open mind and wait until the entire

case was presented before reaching a conclusion as to guilt or innocence. (J.A. 72-73).

Out of the second panel of four jurors, one juror, Ms. Walters, acknowledged a discussion with her supervisor, who lived on the victim's block. (J.A. 73). The court and defense counsel both asked questions which elicited from Ms. Walters the content of discussion, and she explained that her supervisor had expressed no opinion about the case, but simply had said that she had known the victim and was very sorry this had happened. (J.A. 73, 75). This discussion did not cause her to have an opinion on the matter nor create any bias or prejudice. (J.A. 73-75). She indicated that she could perform jury duty with an open mind, wait for all the evidence before reaching a conclusion as to guilt or innocence, and reach a fair and impartial verdict based on the law and the evidence. (J.A. 74-75). The remaining panelists indicated that they had reached no opinion in the case based upon what they had read in the newspapers, and were sensible of no bias or prejudice as a result of what they had read. (J.A. 79).

Out of the third panel of four jurors, only Nanci Haines had discussed the case with anyone, and that person had not stated an opinion. (J.A. 76). This discussion had not caused Haines to form an opinion, nor did it prejudice her. (J.A. 76-79). However, Haines was struck for cause on defense motion that she was "not as frank as she could be" concerning the effect of her feelings toward members of the Islamic Faith and toward defense counsel. (J.A. 81). While the three remaining members of this panel had read something about the case, they had reached no opinion and were not biased as a result of

what they had read. (J.A. 79). The panel members indicated that they could render an impartial verdict based on the law and the evidence. (J.A. 80).

No member of the fourth panel of four prospective jurors had discussed the case with anyone. (J.A. 82). One member, Mr. Suter, had seen headlines about the case, but was not biased or prejudiced as a result of the headlines. (J.A. 82). No juror had been exposed to an opinion about the case. (J.A. 83). All four said they could decide the issues with an open mind and wait until the entire case was presented before reaching an opinion. (J.A. 83-84).

No member of the fifth panel of four jurors had discussed the case with anyone, formed an opinion about the case, or been exposed to newspaper accounts creating any bias or prejudice on their part. (J.A. 85). All of them were satisfied that they could enter the jury box with open minds and wait for the presentation of the entire case before reaching a conclusion as to innocence or guilt. (J.A. 85).

Out of the sixth panel of four jurors, Martha Felmley and Barney Rish said they had discussed the case. (J.A. 86). Felmley was removed from the jury panel because of her inability to impose a death sentence. (J.A. 86-87). Rish said he had discussed the case "just casually." (J.A. 86). He stated that he had not formed an opinion based on his casual discussions. Neither Rish nor the two remaining jurors was aware of any bias or prejudice about the case. (J.A. 87). Rish and the two remaining jurors indicated that, regardless of any prior knowledge, they could enter the jury box with open minds and wait until the entire

case was presented before reaching a conclusion as to guilt or innocence. (J.A. 88).

Voir dire continued with a seventh panel consisting of the final two jurors from the original twenty-six summoned by the trial judge. One juror, Donna Deiotte, a newspaper reporter, stated that she had discussed the case with someone who had expressed an opinion. Neither she nor the other juror had formed an opinion nor developed any bias as a result of having read newspaper articles or engaged in discussions. (J.A. 88, 89). However, Deiotte equivocated as to whether she could enter the jury box with an open mind and wait until the case was presented before reaching a decision. Consequently, she was removed from the jury panel *sua sponte* by the trial judge. (J.A. 90; App. 329).

The trial judge summoned three additional jurors and all were asked the same questions the judge had asked the original jury panel. One of the three jurors, Fred Farnham, was removed for cause based upon his statement that upon a finding of first-degree murder, he could not consider a penalty less than the death penalty. (App. 339-341). The remaining two had read newspaper articles about the case but had not discussed the matter with anyone. Neither was sensible of any bias or prejudice as a result of having read the newspaper articles. Both indicated that they could keep an open mind and wait until the entire case was presented before reaching a conclusion as to guilt or innocence. (J.A. 90).

The final prospective juror, Malcolm Friend, was asked the same questions the judge had asked the original panel. He stated he had not acquired any information

about the case from any source, formed or expressed an opinion as to Mu'Min's guilt or innocence, or heard the case discussed in any manner. He knew of no reason why he could not sit and render a fair and impartial decision based upon the law and the evidence. (J.A. 93-94; App. 364-380).

At this point the judge declared that all twenty-six prospective jurors stood indifferent in the case, and the remaining replacement jurors were excused. (App. 380-381). The panel members were returned to the courtroom where six each were peremptorily struck by both the Commonwealth and Mu'Min. The remaining fourteen were sworn and seated. The first 12 sat as the deliberating jury, and the two alternates took no part in either the determination of Mu'Min's guilt or innocence, or his sentence. (App. 849-850; Tr. 4/24/89, pp. 97-98).

SUMMARY OF ARGUMENT

The conduct of voir dire, including the number and scope of questions to be asked, is a matter within the sound discretion of the trial court. That discretion is reviewable only for manifest error, and there is no such error in this case.

The Constitution does not require that prospective jurors be asked the content of pretrial publicity to which they have been exposed. The relevant question is not what they remember about such publicity, but whether they have formed such fixed opinions that they cannot try the case impartially. Only in very narrow circumstances, where potential prejudices, such as racial bias or

suspicion of disloyalty to the United States, are inextricably bound up in the facts of the particular case in such a way as to intensify those potential prejudices, has this Court held that the Constitution requires that a defendant be allowed to inquire on voir dire into specific areas of possible prejudice. Mu'Min's case clearly does not present such a narrow circumstance.

Moreover, even in the limited instances when this Court has held that the opportunity for specific voir dire inquiry is guaranteed by the Constitution, those rulings have mandated only questions pertaining directly to the prospective juror's assessment of his or her impartiality when confronted with the allegedly prejudicial issue, *not* the juror's underlying factual knowledge related to the issue. The inquiry Mu'Min seeks is thus far more extensive and intrusive than any this Court has previously required under the Constitution.

The fact that this is a capital case does not constitute a special circumstance justifying the rule Mu'Min advocates. Mu'Min cannot rely on the Eighth Amendment because he did not preserve this argument in the Supreme Court of Virginia. Moreover, the considerations dictating that a capital murder defendant be allowed to inquire on voir dire about possible racial prejudice do not apply to inquiries about possible bias resulting merely from exposure to pretrial publicity. And the type of inquiry Mu'Min seeks would be far more intrusive than the inquiry into racial prejudice that this Court has required in interracial capital cases.

Voir dire questions of the type Mu'Min advocates also may result in adverse consequences for the defense.

In addition, they would substantially change the nature of trial practice in jurisdictions which do not allow them, virtually mandate individual voir dire for the first time, and exacerbate the existing problems of delay, congestion, and expense which plague criminal courts.

Finally, the voir dire in Mu'Min's case was conducted carefully and even-handedly. Although eight of the trial jurors had read or heard something about the case, none had formed *any* opinion about it, much less an opinion which could not be set aside in accordance with the instructions of the court. In sum, Mu'Min was tried by a fair and impartial jury, and that is all the Constitution requires.

ARGUMENT

THERE IS NO CONSTITUTIONAL RIGHT TO "CONTENT" QUESTIONS DURING VOIR DIRE IN A CRIMINAL CASE GENERALLY, OR IN A CAPITAL CASE SPECIFICALLY.

A. The Conduct Of Voir Dire Is Left To The Discretion Of The Trial Judge.

In *Ristaino v. Ross*, 424 U.S. 589, 594 (1976), this Court observed that "[t]he Constitution does not always entitle a defendant to have questions posed during voir dire specifically directed to matters that conceivably might prejudice veniremen against him." In *Connors v. United States*, 158 U.S. 408, 413 (1895), the Court noted that voir dire "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound

discretion." Even where this Court has recognized a constitutional requirement that a specific voir dire inquiry must be allowed when requested, the trial court retains discretion over how the inquiry is conducted and what conclusions are reached. *See, e.g., Turner v. Murray*, 476 U.S. 28, 37 (1986).

In *Reynolds v. United States*, 98 U.S. 145, 156-157 (1879), this Court held that a trial court's findings of impartiality from observations of jurors were entitled to great weight. *Accord Patton v. Yount*, 467 U.S. 1025, 1038 (1984); *Wainwright v. Witt*, 469 U.S. 412, 426 (1985); *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). As this Court noted in *Wainwright v. Witt*, "the question whether a venireman is biased has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the venireman's state of mind." 469 U.S. at 428. The question of partiality of an individual juror is a two-fold question of historical fact: "Did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." *Patton*, 467 U.S. at 1036. Because "such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province," the trial judge's determination of such matters is entitled to deference on direct appeal. *Witt*, 469 U.S. at 428.[5]

Despite what might be shown by the printed record in a case, "there will be situations where the trial judge is

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[5] This is why such findings are also entitled to a presumption of correctness in habeas corpus cases under 28 U.S.C. § 2254(d). *Witt*, 469 U.S. at 429.

left [after voir dire] with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Witt*, 469 U.S. at 425-26. The converse also is true: there will be situations where the trial judge is left after voir dire with the definite impression that a prospective juror would be *able* to faithfully and impartially apply the law.

"This is why deference must be paid to the trial judge who sees and hears the juror," *Witt*, 469 U.S. at 426, and this is why a trial judge's conclusions as to juror bias may be overturned only for "manifest error." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961).[6]

This exacting standard applies also to capital cases where, "as elsewhere, the quest is for jurors who will conscientiously apply the law and find the facts. That is what an 'impartial' jury consists of. . . ." *Witt*, 469 U.S. at 423. Nor does the standard change just because "pervasive media publicity" is claimed, which this Court has recognized "now arises so frequently in the trial of sensational criminal cases." *Patton*, 467 U.S. at 1031.

The findings of the trial judge here, no less than those made by the trial judges in *Witt* and *Patton*, should thus be upheld by this Court, absent a showing by the defendant of manifest error. *See Reynolds*, 98 U.S. at 157 (burden on defendant seeking exclusion of juror to

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[6] *Irvin* was a change of venue case, but the same standard as to impartiality applies to questions of whether jurors are subject to exclusion for cause because of a lack of impartiality. *Witt*, 469 U.S. at 429.

demonstrate partiality). There was no manifest error in this case.

B. The Constitution Does Not Provide A Right To "Content" Questions.

Even where there has been substantial pretrial publicity in a case, jurors are not required to be wholly ignorant of the facts and issues presented. *Irvin*, 366 U.S. at 722. *"The relevant question is not whether the community remembered the case,* but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton*, 467 U.S. at 1035 (emphasis added). *See also Irvin*, 366 U.S. at 723.

In *Patton*, this rule was applied in the context of a retrial after the defendant's conviction had been reversed by the Supreme Court of Pennsylvania for erroneous admission of his confession. The publicity prior to the second trial had "revealed [the defendant's] prior conviction for murder, his confession, and his prior plea of temporary insanity, information not admitted into evidence at [re]trial." *Patton*, 467 U.S. at 1029. The pretrial publicity in *Patton* was thus of far greater potential prejudice to the defendant than was the publicity in Mu'Min's case. Moreover, eight of the fourteen jurors who tried the defendant admitted that "at some time they had formed an opinion as to [the defendant's] guilt." *Patton*, 467 U.S. at 1029-1030. None of Mu'Min's jurors had formed any opinion about the case. If recollection of the case by the community, and hence by the venire, was insufficient to disqualify the jurors in *Patton*, it clearly was insufficient in Mu'Min's case.

Mu'Min's argument is founded upon two faulty unspoken premises: first, that the more pretrial publicity a juror has read or heard about a case, the more likely he or she is to be prejudiced against the defendant, and second, having become thus prejudiced, a prospective juror will be unwilling or unable to acknowledge his or her bias. Neither of these premises is sound.

The assumption that exposure to pretrial publicity automatically affects a juror's impartiality is not borne out by experience, even when such publicity reveals a defendant's prior criminal record. *See, e.g., Murphy v. Florida*, 421 U.S. 794, 800-801 (1975) (four of six jurors who had prior knowledge of defendant's criminal record "volunteered their views of its irrelevance, and one suggested that people who have been in trouble before are too often singled out for suspicion of each new crime . . . ."). To entertain this assumption is to violate this Court's teaching in *Murphy*:

> We must distinguish between mere familiarity with petitioner or his past and an actual disposition against him, just as we have in the past distinguished largely factual publicity from that which is invidious or inflammatory. [Citations omitted]. To ignore the real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who were well known in the community, whether they be notorious or merely prominent.

421 U.S. at 800, n.4.

In short, the relevant inquiry is not the content of what prospective jurors have read or heard, but rather what effect the information had on them. The potential

juror's impartiality in the face of exposure to publicity will depend on his or her unique critical thinking skills and independence of mind. Such qualities may well be found to a greater extent in people who follow news accounts more closely and consistently, and thus would be prepared to recite greater familiarity with pretrial news accounts. Any direct correlation between a potential juror's exposure to pretrial publicity and his or her partiality is thus illusory.

A broad assumption that prospective jurors cannot or will not acknowledge their publicity-engendered bias against the defendant is likewise unfounded. Anyone who hides his bias against a defendant by untruthful answers on voir dire will also likely conceal the extent of his knowledge about the case from pretrial publicity. The inquiry which Mu'Min advocates would be wasted on such individuals.

Moreover, such basic mistrust of jurors runs counter to the fundamental belief upon which the constitutional guarantee of trial by jury is premised, "that juries will follow the law, that they will not convict on mere suspicion but will instead require proof beyond a reasonable doubt," *United States v. Scarfo*, 850 F.2d 1015, 1025 (3d Cir. 1988), *cert. denied*, 488 U.S. 910 (1988), *citing Richardson v. Marsh*, 481 U.S. 200, 206 (1987), and the well-founded belief in "the determination, the sense of responsibility and the individual integrity by which men judge men." *Dennis v. United States*, 339 U.S. 162, 172 (1949). *See also Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985). Whether these principles are rooted in absolute truth or in the

need for practical accommodations of competing interests, *see Richardson*, 481 U.S. at 211, they militate strongly against the assumption Mu'Min urges on the Court.

Common experience supports these principles upon which our system is founded, and not the cynical assumption which Mu'Min would have this Court make. Juror Syphrett indicated he did not feel that he could sit with an open mind, and was dismissed *sua sponte* by the trial judge. (J.A. 48-49). Nothing in the record supports an assumption that other prospective jurors suppressed or concealed a similar disability, and the law requires a presumption of impartiality in the absence of such a record. Indeed, experience shows that even racial prejudice is sometimes disclosed by jurors. *See Ristaino*, 424 U.S. at 593.

None of this Court's prior decisions supports Mu'Min's position.[7] In *Rideau v. Louisiana*, 373 U.S. 723

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[7] The lower federal courts that have addressed the question are split on the issue of content questions. While the Eleventh Circuit does not require such questions at all, *United States v. Montgomery*, 772 F.2d 733, 735-736 (11th Cir. 1985), others have required only a limited inquiry into exposure to publicity. *United States v. Poludniak*, 657 F.2d 948, 956 (8th Cir. 1981), *cert. denied, sub nom. Weigand v. United States*, 455 U.S. 940 (1982); *United States v. Haldeman*, 559 F.2d 31, 65-66 (D.C. Cir. 1976), *cert. denied, Erlichmann v. United States*, 431 U.S. 933 (1977). The Seventh Circuit has held that questioning must be specific enough to alert the *jurors* to the problem of pretrial publicity in evaluating their own fitness to serve. *United States v. Dellinger*, 472 F.2d 340, 375-376 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). The Fifth and Ninth Circuits have required

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(1963), *Estes v. Texas*, 381 U.S. 532 (1965), and *Sheppard v. Maxwell*, 384 U.S. 333 (1966), this Court presumed prejudice in the circumstances under which the trials occurred. In *Rideau*, a twenty-minute film of the defendant's dramatically staged confession had been broadcast by television three times in the community where the crime and trial had occurred. *Sheppard* involved extremely inflammatory publicity, and both *Sheppard* and *Estes* involved trials conducted in a "circus" atmosphere. *See Murphy*, 421 U.S. at 799. Nothing even approaching a "circus" atmosphere prevailed in Mu'Min's case and the case was tried with all due solemnity.

This Court has held that there is a constitutional requirement that particular lines of voir dire inquiry be permitted only in very limited circumstances. In *Dennis v. United States*, 339 U.S. 162 (1950), and *Morford v. United*

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detailed content questioning. *United States v. Davis*, 583 F.2d 190, 196 (5th Cir. 1978); *Silverthorne v. United States*, 400 F.2d 627, 639 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022 (1971). *But see United States v. Giese*, 597 F.2d 1170 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979); *United States v. Polizzi*, 500 F.2d 856 (9th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975).

While most states have not specifically ruled on the issue, three states in addition to Virginia have expressly rejected a rule requiring content questions. *State v. Lucas*, 328 S.E.2d 63, 64-65 (S.C. 1985), *cert. denied*, 472 U.S. 1012 (1985); *Commonwealth v. Burden*, 448 N.E.2d 387, 393 (Mass.App. 1983); *Commonwealth v. Dolhancryk*, 417 A.2d 246, 248 (Super. Ct. Pa. 1979). The statutes or rules of court of several other states apparently would permit a trial court to decline to ask content questions. *See* Ind. Code Ann. § 35-37-1-5 (Burns 1985 and Supp. 1990); Neb. Rev. Stat. §§ 25-1636 and 29-2006 (1989); Okla. Stat. Ann. Tit. 22, § 662 (West 1969 and Supp. 1990); Tex. Crim. Proc. Code Ann. § 35-16 (Vernon 1989 and Supp. 1990); Utah R. Crim. Proc. 18 (1990); Wyo. Stat. § 7-11-106 (1987 and 1990 Supp.). *See also Hopt v. People*, 120 U.S. 430 (1887).

States, 339 U.S. 258 (1950), fundamental fairness required that a Communist and a recordkeeper in the National Council for American-Soviet Fellowship, Inc., both accused of failing to comply with compulsory process from the House Committee on Un-American Activities, be allowed to question government employees on their respective jury panels about the potential influence of the "Loyalty Order" such employees had been forced to take upon their ability to judge the cases fairly and impartially.

These decisions, however, were highly specific with reference to both the defendant and the prospective juror. They turned upon the defendant's having made a preliminary showing of a direct personal interest on the part of the juror in avoiding any appearance of disloyalty to the federal government. This was an interest which might have influenced jurors not to acquit the defendants of the crimes with which they were charged. Upon such a showing, *Dennis* and *Morford* required that the defense be allowed to make direct inquiry into feelings of bias. Clearly, however, even these two cases did not come close to requiring the type of inquiry which Mu'Min seeks.

Likewise in *Ham v. South Carolina*, 409 U.S. 524 (1973), this Court recognized a constitutional right to inquire whether prospective jurors entertained racial prejudice against Black people in a case where the defendant, a Black person, maintained that he had been unjustly accused of an offense in retaliation for his civil rights work on behalf of Black people. Fundamental fairness required such a line of questioning because racial issues "were inextricably bound up with the conduct of the trial," and because "Ham's reputation as a civil rights

activist and the defense he interposed were likely to intensify any prejudice that individual members of the jury might harbor." *Ristaino*, 424 U.S. at 597. Significantly, the only questions *constitutionally* required were ones that directly addressed the jurors' *attitudes* towards the issues. Questions calling upon them to divulge the content of their knowledge of civil rights groups, Blacks, or the defendant in particular were not required.[8] *Ham*, 409 U.S. at 525 n.2 and 527.

Thus, a constitutional right to pursue a specific line of inquiry on voir dire has been limited to situations where potentially prejudicial matters, such as racial prejudice or suspected disloyalty to the United States, have been uniquely involved in the facts of the particular case in such a way as to inflame or "intensify" the jurors' possible prejudices. By contrast, pretrial publicity exists in every major criminal case. The jurors examined in this case were no different from any juror who reads or hears news accounts in any case, and the news accounts were not uniquely involved, or "inextricably bound up" in the facts of Mu'Min's case in such a way as to inflame or "intensify" any juror's possible bias.

The voir dire employed by Chief Justice Marshall to assure a fair trial to Aaron Burr in the face of extensive publicity, which Mu'Min acknowledges this Court has cited with approval many times, included no general questions concerning what publicity prospective jurors had read, but only "Have you made up your mind on the

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[8] For many reasons, racial prejudice in jurors is a matter of far greater concern than bias engendered from news accounts. (See Part C2 below).

case, or on the guilt of Colonel Burr, from the statements you have seen in the papers or otherwise?" and "Have you formed and expressed (or delivered) an opinion on the guilt or innocence of Colonel Burr. . . . ?" *United States v. Burr*, 25 Fed. Cas. No. 14, 693 (Text of proceedings), p. 58 (C.C. Va. 1807).

After determining that most jurors in Mu'Min's case had previously heard of the case, the trial court asked the jurors whether that information caused them to form an opinion and whether they could decide the case only on the evidence. No juror had formed an opinion, and they all indicated they could render their verdict only on the evidence presented. Clearly, this voir dire was thorough enough to permit the court to determine, without regard to the content of the information, that the jurors were impartial.[9] *See Beck v. Washington*, 369 U.S. 541, 557 (1962); *Ristaino*, 424 U.S. at 596-97 (specific questioning only required if circumstances of the case strongly support a need).

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[9] Mu'Min suggests (Pet. Br. at 30, n.25) that greater latitude in defense questioning must be granted to permit the intelligent exercise of peremptory challenges. The purpose of voir dire, however, is to provide the assurance that the defendant receives a fair and impartial trial, not to help the defense make discretionary challenges. Indeed, "peremptory challenges . . . are not required by the Constitution." *Ross*, 487 U.S. at 89. Because peremptory challenges are a creature of statute and rules of court only, it is for the states "to define their purpose and the manner of their exercise." *Id*. The absence of a constitutional basis for peremptory challenges precludes a constitutional requirement that voir dire be structured to aid the defense in making discretionary challenges. *Cf. Pennsylvania v. Finley*, 481 U.S. 551 (1987) (when a state chooses to act in an area of state discretion, the federal Constitution does not dictate the form of state assistance).

C. The Constitution Does Not Require That "Content" Questions Be Asked During Voir Dire In A Capital Case.

1. Insofar As Mu'Min's Claim Is Founded Upon The Eighth Amendment, It Is Not Properly Before The Court.

Petitioner asserts that he was constitutionally entitled under the Eighth Amendment to ask the proposed content questions. (Pet. Br. 16). The record establishes, however, that Mu'Min presented no Eighth Amendment claim on direct appeal. Accordingly, any such argument is jurisdictionally barred from review by this Court. *See Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987); *Cardinale v. Louisiana*, 394 U.S. 437 (1969); Rule 14.1(h).

On direct appeal, Mu'Min did not assign as error any Eighth Amendment claim. In his brief, at the outset of a nine page argument on the voir dire issue, petitioner made a one sentence reference to the greater reliability required by the Eighth Amendment in death penalty cases. (Def. Br. 12). This "generic reference" was never subsequently developed in any manner whatever. *Cf. Taylor v. Illinois*, 484 U.S. 400, 401 n.9 (1988) (generic reference to Fourteenth Amendment not sufficient to preserve constitutional claim based on unidentified provision of Bill of Rights); *Beck*, 369 U.S. at 550-553 (constitutional contention not made at trial, not listed in assignments of error, and set forth in one sentence of 125 page brief, considered waived by state supreme court; not entertained by United States Supreme Court). Instead, Mu'Min presented arguments focusing exclusively upon state law issues and his rights under the Sixth and Fourteenth Amendments to a trial by an impartial jury. *See generally*

Witt, 469 U.S. at 423 (exclusion of jurors based on views of death penalty is grounded on Sixth Amendment right to trial by fair and impartial jury, rather than on Eighth Amendment safeguard against cruel and unusual punishment).

The Supreme Court of Virginia clearly did not construe his arguments as raising any Eighth Amendment issue; in its opinion, the Court referred exclusively to alleged violations of due process and Mu'Min's right to trial by an impartial jury. 239 Va. at 442, 389 S.E.2d at 392. Indeed, in rejecting petitioner's arguments, the Supreme Court of Virginia never once cited the Eighth Amendment or any Eighth Amendment case.[10] Under these circumstances, petitioner is jurisdictionally barred from relying upon the Eighth Amendment in this Court.[11]

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[10] Thus, this case is distinguishable from *Taylor v. Illinois*, 484 U.S. 400 (1988), in which this Court rejected Illinois' argument that the petitioner's Sixth Amendment claim was barred because it had not been raised in the state courts. As the Court noted in *Taylor*, the petitioner had relied upon several of its prior Sixth Amendment cases in his state appellate brief. 484 U.S. at 401 n.9. Mu'Min's brief on direct appeal as well as the opinion of the Supreme Court of Virginia make clear that nothing comparable occurred in this case.

[11] Mu'Min is not free to argue that the Supreme Court of Virginia misinterpreted the scope of his argument. Petitioner had a duty to petition the state Supreme Court for a rehearing if he thought the Court had overlooked an Eighth Amendment claim. *See* Rule 5:39 of the Rules of the Supreme Court of Virginia.

2. Mu'Min's Reliance Upon *Turner v. Murray* Is Misplaced.

In *Turner v. Murray*, 476 U.S. 28, 35 (1986), this Court held that, because of the degree of discretion afforded a capital sentencing jury, "there is a unique opportunity for racial prejudice to operate but remain undetected." Thus, where a capital defendant is charged with an interracial crime, he is constitutionally entitled to question prospective jurors on the issue of racial prejudice.[12] 476 U.S. at 36-37.

The *Turner* decision focused specifically on the *sentencing discretion* of the jury, and this Court vacated Turner's death sentence *only* because it found "an unacceptable risk of racial prejudice infecting the capital sentencing proceeding."[13] Turner's adjudication of guilt was left fully intact. 476 U.S. at 37.

Moreover, while the jurors in *Turner* were asked on voir dire if they were aware of any reason why they could not be impartial, and all responded in the negative, at the time they were asked this question the prospective jurors "had no way of knowing that the murder victim was white." 476 U.S. at 31. Consequently, they had no way of knowing that Turner was charged with an interracial offense.

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[12] In Mu'Min's case, the issue of possible racial bias was fully explored during voir dire (J.A. 4, 28-31; App. 281-282, 287-288, 316, 323, 354-355, 379-380), and petitioner makes no allegation to the contrary.

[13] At his resentencing trial, Turner was again sentenced to death. *Turner v. Commonwealth*, 234 Va. 543, 364 S.E.2d 483, *cert. denied*, 486 U.S. 1017 (1988).

In Mu'Min's case, on the other hand, when the jurors were asked whether they had formed an opinion about the case and whether they could lay aside everything they had heard or read and decide the case solely on the evidence, they possessed all the information they needed – in terms of their exposure to publicity – to give a full and truthful answer. Thus, while there was reason in *Turner* to question or doubt the accuracy of the jurors' avowals of impartiality, no such reason exists here.

Beyond the extremely narrow context of the possibility of latent racial bias infecting a capital sentencing decision, *Turner* did nothing to alter the general principle that the responsibility for conducting voir dire, and for assuring the selection of fair and impartial jurors, is firmly committed to the sound discretion of the trial judge. There are a number of compelling reasons why *Turner* should not be extended beyond the confines of a capital case where latent racial bias might be a factor.

First, in our society racial prejudice is widely considered to be morally reprehensible, whereas the mere forming of an opinion or attitude about a case based on news reports carries no such stigma. More direct questioning on the subject of racial prejudice is thus justified in order to overcome a juror's hesitancy to subject himself to public obloquy by an admission of racial prejudice.

Second, racial prejudice is likely to be a long-standing and largely unconscious attitude, whereas a viewpoint based on news reports is only recently acquired and consciously processed in the mind of the juror. Therefore,

more direct voir dire is justified in order to call the juror's attention to his or her own racial attitude.[14]

Third, racial prejudice will be more difficult for a juror to set aside in accordance with the trial court's instructions than will an impression engendered only by news accounts. As a result, racial prejudice presents a far greater threat to the integrity of the jury verdict than does information from news accounts because the effect of racial prejudice on a juror's decision will *always* be destructive of a fair judgment. Racial prejudice will always distort the juror's judgment; there is no legitimate role that racial prejudice can play in jury deliberations. By contrast, information acquired from news accounts is more easily countered by questioning on voir dire, and by the evidence introduced at trial and instructions of the court.

Finally, this Court characterized the required voir dire in *Turner* as "minimally intrusive," and stated that, "as in other cases involving 'special circumstances,' the trial judge retains discretion as to the form and number of questions on the subject. . . . " 476 U.S. at 37. *Turner* requires nothing more than that the jurors be informed of the facts which might *trigger* their prejudice, and then that they be asked if in fact a prejudice exists in their mind.

What Mu'Min seeks, however, is an inquiry far more intrusive than that mandated by *Turner*. Comparable "content" questions in the *Turner* context would have included questions such as: "What have your experiences been with Black people? What were you taught as a child

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[14] Calling the juror's attention to such bias, so that it may be acknowledged, is the purpose of such questions, rather than challenging the juror's denial of bias. *See Ham*, 409 U.S. at 527.

about Black people? Did you have Black friends as a child? Do you have Black friends now? Have you ever entertained Black guests in your home? Do Black people attend your place of worship? Did you go to school with Black people? Have you ever been frightened by a Black person?" No such intrusive inquiry was constitutionally mandated by *Turner*, nor should it be.

The Constitution simply does not require psychoanalysis of the thought process by which jurors arrive at the determination that they entertain no bias or prejudice. Nor does the Constitution require that the trial judge possess the information gleaned from such a psychoanalysis when the judge assesses the jurors' swearing under oath that they are impartial.

D. Sound Reasons Militate Against Requiring "Content" Questions.

Although this Court in *Ham* and *Turner* has required some voir dire questions, upon defense request, regarding the possibility of racial bias, the Court has also acknowledged that there are risks associated with such questioning. As Justice Powell pointed out in dissent in *Turner*, specific inquiries about racial bias as opposed to more general inquiries about bias may have the undesirable result of suggesting to jurors that considerations of race are relevant to the issues at trial. 476 U.S. at 49, n.6 (Powell, J., dissenting). In a similar manner, calling attention to what was heard or read outside of court might suggest to a juror that out-of-court statements are relevant.

In addition, such questioning could serve to refresh a juror's recollection of the news accounts and make them

more vivid in his mind. This is especially true in this case, where the petitioner relies solely on news accounts occurring three to seven months before trial. If one accepts Mu'Min's premises that a juror's recollection of news accounts about the case will prejudice the defense and that a juror's assurances of impartiality cannot be trusted, then not only are the juror's statements concerning his or her exposure to news accounts likewise suspect, but the net effect of the questions Mu'Min contends should be asked would be to have the juror go into the trial with a more vivid recollection of the allegedly prejudicial news accounts than he would have without the questions.

Furthermore, to require a juror to delineate the content of news items he has read or heard about the case and then permit him to sit on the jury might unwittingly suggest to him the existence of other more damaging news accounts. The juror might conclude that some such accounts were *so* prejudicial that, had he revealed a familiarity with them, he would have been removed for cause.

Moreover, while the rules established by *Ham* and *Turner* requiring inquiry into racial prejudice were susceptible of bright-line standards, no such bright-line test is possible in this case. On the contrary, Mu'Min emphasizes the "unique" facts of this case and acknowledges in effect that his position hinges upon the quantum of pretrial publicity in this case, and this case alone. Criminal cases, both capital and non-capital, run the gamut from obscurity to overwhelming sensationalism, with no obvious point in the spectrum to establish a brightline standard. The applicability of the rule would ultimately be a question for the discretion of the trial judge, the very

discretion which Mu'Min would have this Court now remove.

A final major consideration is the practical effect that such a rule would have on state courts. While there is no constitutional right to individual voir dire of jurors, requiring the sort of "content" questions advocated by Mu'Min would effectively require individual voir dire, otherwise the "content" revealed by one juror could "contaminate" all other jurors on that panel. This Court has repeatedly emphasized, however, that voir dire and the determination of impartiality are matters particularly within the province of the trial judge. *See, e.g., Ristaino,* 424 U.S. at 594-95. A ruling in favor of Mu'Min would inevitably result in the type of marathon voir dires which already are permitted in some states, but which states like Virginia have scrupulously and appropriately endeavored to avoid.[15]

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[15] California is one state which has adopted an approach to voir dire similar to that which Mu'Min advocates. *See People v. Williams*, 29 Cal.3d 392, 628 P.2d 869 (1981). Yet the results of a survey published by the National Center for State Courts indicate that, among California lawyers and judges, "everybody except criminal defense lawyers" believes criminal voir dire in California to be a "horrible perversion of the justice system," and, even among defense lawyers, the rate of attorney satisfaction with jury selection was no higher in California than in Colorado, where the length of voir dire is closely monitored in the trial judge's discretion, and voir dire time limits of 30 to 45 minutes were commonly reported. Even within California, the highest rate of attorney satisfaction with jury selection was reported in Monterey, where an informal local policy limits the length and extent of voir dire. *See* Sipes, *On Trial, The Length of Civil and Criminal Trials* 42-45 (National Center for State Courts, 1988).

Moreover, this rule would not be limited to issues of pretrial publicity. If a juror had any knowledge of the case, the details of such knowledge would, under the same principles, have to be disclosed during voir dire. Voir dire in criminal cases conducted in small towns or rural localities, where many of the jurors had known the defendant his entire life, would require each juror to provide his or her recollection of the defendant's life story. Plainly, the operation of such a rule would change the nature of criminal trials in a major portion of the nation, making the voir dire longer than the trial itself.

In 1971, then Chief Justice Warren E. Burger, in a speech to the National Conference on the Judiciary in Williamsburg, Virginia, commented that selection of a jury has "become in itself a major piece of litigation consuming days or weeks," and predicted that American citizens would soon "lose patience with the cumbersome system." Los Angeles Times, Mar. 13, 1971, § 7 at 17, col. 1. The rule advocated by Mu'Min would unquestionably exacerbate the existing problems of delay, congestion, and expense which continue to plague state criminal courts.

E. The Trial Court Did Not Abuse Its Discretion In Impanelling Mu'Min's Jury.

The trial judge heard the veniremen's answers during voir dire, observed their demeanor and determined their credibility. He concluded that those who were to serve on Mu'Min's jury were impartial. (Tr. 4/17/89, p. 182). This factfinding is owed the same degree of deference historically given to other findings of fact made by a trial court.

1. The Jury Selection Process Was Thorough And Fair.

The voir dire in Mu'Min's case was conducted painstakingly, carefully protecting the interests of the defendant. Group voir dire spanned 39 transcript pages (App. 221-262), and small panel voir dire spanned an additional 106 transcript pages. (App. 274-381). On at least seven separate occasions during panel voir dire, the trial judge assisted the defense with follow-up questions that expanded the scope of the question asked by the defense; required a more specific response from the panel; clarified a point for the defense; or covered a topic the defense had covered with one panel but neglected to cover with another. (App. 275-277, 280-281, 284-285, 287, 291-294, 319, 328). The court allowed the defense to ask jurors if they were biased against members of the Islamic faith (J.A. 77), whether they would be able to judge the case fairly in light of the facts that the defendant was Black, the victim was white, and the victim had been found nude from the waist down (J.A. 76), and whether they had ever been the victim of a racial incident involving a Black person. (J.A. 84, 86). The trial court struck Juror Haines for cause, upon Mu'Min's motion and over the prosecution's objection, because the court felt she had not been as frank as she could have been concerning her opposition to the Islamic religion and her prejudice against defense counsel arising from a previous case. (J.A. 77-78, 81).

When a juror indicated that her discussions with her supervisor might unconsciously prejudice her judgment, Mu'Min and the trial court both inquired into the substance of her discussions with her supervisor. (J.A. 73-75).

Mu'Min was also allowed to inquire into how jurors' judgment would be affected by the extent of their acquaintances with the victim (J.A. 85), and a witness. (J.A. 89). In questioning a juror who was employed as a newspaper editor, the court asked her if she had attended any news briefings or conferences concerning the Mu'Min case. (App. 328). She had not, but when she equivocated about her ability to judge the case fairly, the court struck her *sua sponte*. (App. 329). The court rejected any suggestion by the prosecution of challenge to a juror who had said it would be very difficult for him to impose the death penalty. (App. 309).

"[T]he question is whether there is fair support in the record for the state court's conclusion that the jurors here would be impartial." *Patton*, 467 U.S. at 1038. Specifically, the relevant question is "did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed."[16] *Id.* at 1036.

The answer to the first part of the inquiry is easily discernible because, unlike eight of the twelve *Patton*

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[16] The issue here is not whether the jurors as a whole had such fixed opinions that they were unable to fairly judge the guilt of the defendant because, unlike the petitioner in *Irvin*, 366 U.S. at 720, Mu'Min is not attacking the partiality of the jury as a whole; indeed, he has abandoned his claim that the trial court erred in denying his motion for a change of venue. Rather, he is asserting that the trial court's failure to ask certain questions deprived him of the ability to determine the potential bias of individual jurors. Even if the "jury as a whole" test applied here, however, the test would be met because none of the jurors had any "fixed opinions" about the case.

jurors, each of the jurors who tried Mu'Min indicated expressly that they had formed no opinion about the case at all and could try it solely upon the evidence. (J.A. 48, 52, 72-74, 76, 79-80, 83-86, 88, 90-91, 93).

The second prong of the inquiry must also be answered in the affirmative. Here, as in *Patton*, the trial court questioned the prospective jurors at length; in fact, the court questioned them both as a group and in panels of four and two. Unlike the jurors' responses in *Patton*, however, 467 U.S. at 1038-1039, the answers of the persons who sat on Mu'Min's jury were neither ambiguous nor contradictory.

The jurors here were clear and unequivocal in their responses that they had no opinions about the case and could set aside whatever they had heard or read and decide the case only upon the evidence. They were not hesitant to discuss issues and offer information in response to questions. And, importantly, the trial judge did not hesitate to dismiss any juror who indicated that he had an opinion or who equivocated in discussing the matter.

Any claim that the impartiality of the jury was not properly determined must focus on the jurors who actually sat. *See Ross v. Oklahoma*, 487 U.S. 81 (1988); *Patton*, 467 U.S. at 1037. Of the twelve jurors who actually tried the case, four stated that they had never heard anything about it. (Tr. 4/17/89, pp. 5-7; J.A. 46-48). One of the other jurors said he had not heard anything during the original panel voir dire, but indicated he had during the small panel voir dire. (J.A. 46-48, 79). Six stated that they had read about or discussed the case. (J.A. 46-48). These

seven jurors exposed to outside information about the case were all part of the original twenty-six member panel that had been asked whether they could try the case according to the law as instructed by the judge and on the evidence that they would hear from the witness stand. Each had indicated that he or she could. (J.A. 44).

All twelve jurors indicated that they were not sensible to any bias against Mu'Min; that they understood he was presumed innocent until proven guilty beyond a reasonable doubt; that it was the Commonwealth's burden to prove him guilty beyond a reasonable doubt; that they could not consider the fact that Mu'Min had been indicted and was on trial as evidence of guilt; and that Mu'Min did not have to produce any evidence in his defense. (J.A. 44-46).

The judge then asked the following questions regarding outside sources of information and pretrial publicity:

> Have any of you acquired any information about the offense, the alleged offense, or the accused from the news media or from any other source?
>
> Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case?
>
> Is there anyone that would say what you've read, seen, heard, or whatever information you may have acquired from whatever the source would affect your impartiality so that you could not be impartial?
>
> Have any of you expressed or formed an opinion of the innocence or guilt of the accused?

> Is there any person who has already formed an opinion as to the innocence or guilt of the accused?
>
> Considering what the ladies and gentleman who have answered in the affirmative have heard or read about this case, do you believe that you can enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of the accused?
>
> In view of everything that you've seen, heard, or read, or any information from whatever source that you've acquired about this case, is there anyone who believes that you could not become a Juror, enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?

(J.A. 46-48).

Each of the jurors who had heard something about the case indicated that the outside information would not affect his or her impartiality, that he or she had formed no opinion based on the outside source of information, and that the outside source of information would not affect his or her ability to enter the jury box with an open mind and determine Mu'Min's guilt or innocence only on the basis of the evidence presented. (J.A. 48). These jurors were consistent when questioned again along the same lines during the smaller panel voir dire sessions. (App. 275; J.A. 72-80; App. 292; J.A. 84-85).

One of the jurors who had indicated she had heard about the case, Ms. Walters, had discussed the case with her supervisor. She volunteered that the supervisor lived in the same block as the victim. (J.A. 73). The trial judge

allowed Mu'Min's attorney to explore the discussion with the supervisor at length (J.A. 73-74), and to elicit from Ms. Walters the content of the discussion. (J.A. 75). The court encouraged Ms. Walters to reveal any additional content concerning the supervisor's knowledge of the victim. (J.A. 75). In response to repeated questioning by the court over the prosecutor's objections, Ms. Walters said there was no question in her mind about her ability to enter the jury box with an open mind and reach a fair and impartial verdict based only on the law and the evidence. (J.A. 74-75).

Another juror admitted during voir dire he had discussed the case with somebody the previous day who informed him that "there was a murder trial or something on." (J.A. 51). That was the total "content" of his outside knowledge of the case. He indicated he had not read anything about the case, had formed no opinion, and the brief discussion he had had would not affect his ability to enter the jury box with an open mind and decide the case based on the evidence presented. (J.A. 51-52).

In sum, each time a prospective juror equivocated in answering questions related to cause, or indicated a possible bias, the trial judge struck the juror *sua sponte*. Of the twelve who sat, eleven gave absolutely no cause for further inquiry concerning pretrial publicity. The only one who did so was questioned extensively by Mu'Min's counsel. In response to questioning by court and counsel, she disclosed the contents of the remarks she had heard, and her answers convinced an impartial judge that the conversation would not affect her judgment. The record with regard to the twelve jurors who sat in Mu'Min's case

provides strong support for the trial judge's determination of impartiality.

2. There Is No Reason To Doubt The Trial Court's Findings.

It is significant that at the conclusion of the small panel voir dire, Mu'Min did not renew his motion to strike for cause those jurors who had been exposed to outside information. Nor did he renew his motion for a change of venue at that time. Plainly, Mu'Min was sufficiently impressed with the fairness of the panel thus assembled to forego these motions and try his case to a jury picked from this panel.

In *Patton*, this Court recognized the fundamental reality of juror voir dire:

> It is well to remember that the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed. . . . Prospective jurors represent a cross section of the community, and their education and experience vary widely. Also, unlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand. Jurors thus cannot be expected invariably to express themselves carefully or even consistently. *Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially.*

467 U.S. at 1039 (emphasis added). The trial judge here conducted a lengthy and fair voir dire which revealed neither a fixed opinion nor any predisposition as to guilt

or sentence among the jurors who tried Mu'Min. This Court should defer to those findings of impartiality.

At the time of the motion for a change of venue, defense counsel conceded that *"taking all these articles individually you don't come up with much."* (J.A. 9) (emphasis added). He did not assert that the publicity made a fair trial impossible or even unlikely, and when the trial court thus noted that the motion was premature and that "we just may be able to get a jury," *defense counsel expressly agreed.* (J.A. 12).

The submitted articles include news coverage over four months, from September 26, 1988 to January 14, 1989. The resulting average of four articles per week was not excessive, considering this was an atrocious murder case in a suburban area. The majority of the submitted articles appeared in the Potomac News, a small local paper of limited circulation. They were not inflammatory. Several contained the facts surrounding the crime, investigation and judicial proceedings. Others were criticisms of the Virginia Department of Corrections' road work program.[17]

While some of the reports included information about Mu'Min's prior criminal record, including his 1973 murder conviction, evidence of that murder conviction

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[17] Although Mu'Min referenced additional news articles in his renewal of the motion for change of venue on April 17, 1989, Mu'Min does not now rely upon any such additional articles.

was introduced at trial. (App. 447). Mu'Min's own statement that he stabbed the victim was also admitted at trial. (App. 650).

At the conclusion of the group voir dire, Mu'Min renewed his motion for change of venue, stressing only the amount of publicity rather than the nature of any particular news account. (J.A. 69). The trial judge denied his motion, noting the absence of any effect on the jury from the publicity. (J.A. 71).

No specific publication of clear prejudicial potential was ever cited by defense counsel in connection with his voir dire requests. Mu'Min may not now complain that specific questions were not allowed to assess jurors' exposure to some particular news account. *See Nebraska Press Association v. Stuart*, 427 U.S. 539, 602 (1976).

The pre-trial publicity in this case clearly did not create the "extremely inflammatory" background which occurred in *Sheppard v. Maxwell*, 384 U.S. 33 (1966) or *Rideau v. Louisiana*, 373 U.S. 723 (1963) or the "circus atmosphere" found in *Estes v. Texas*, 381 U.S. 532 (1965). *See Murphy v. Florida*, 421 U.S. 794, 798-802 (1975). There is thus no basis for arguing that the jurors' answers should be suspect as a matter of law.

An inquiry into the content of the information jurors had obtained could not have affected the trial court's assessment of impartiality. Petitioner argues that without specific exploration of the source, content and quantity of information that a juror has received, the trial court was

unable to assess whether the juror's statements of impartiality were to be believed. What Mu'Min ignores, however, is the absence of *any* preconceived opinion that would call impartiality into question in the first place.

An examination of the sources and content of a juror's prior knowledge of the case has potential relevance only for the purpose of assessing whether the juror can lay aside a preconceived opinion based on extrinsic information and render a verdict based only on the evidence presented in court. Content questions, however, cannot expose a bias or prejudice that would preclude setting aside an opinion that does not exist.

In view of the great deference owed to the discretion of trial judges to control the conduct of voir dire, this Court has restricted any constitutional requirement of particular inquiry to those exceptional cases where significant and compelling circumstances mandate it. *See, e.g., Turner; Ham; Ristaino.* Those circumstances are not demonstrated where, as here, the nature and extent of the publicity does not give rise to any substantial likelihood of presumptive prejudice, and the voir dire itself completely rebuts any suggestion of actual prejudice.

CONCLUSION

For the foregoing reasons, Mu'Min had no constitutional right to inquire into the content of publicity to which his trial jurors had been exposed. The voir dire was thoroughly and properly conducted, with the result that Mu'Min was tried by a fair and impartial jury. The Commonwealth of Virginia therefore respectfully

requests that the judgment of the Supreme Court of Virginia be affirmed.

Respectfully submitted,

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